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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether a municipal ordinance enacted without any state authority is shielded from antitrust scrutiny when it imposes ceilings on the price which property owners may charge for rental housing.

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTERESTS OF AMICUS CURIAE, WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 185,000 members, contributors and supporters throughout the United States (many of who reside in cities with rent control) whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared as *amicus curiae* in a number of Supreme Court cases dealing with the rights of businesses and individuals. In

addition, WLF has appeared before regulatory agencies which have sought to restrict the rights of businesses.

WLF believes that the price controls that the City of Berkeley has imposed on the rental housing market is deleterious to the local and national economy and contrary to the public interest. In the name of helping lower income renters, advocates of rent control are actually hurting those they profess to care about most. In the process, the City of Berkeley is forcing certain private citizens to subsidize this failed social experiment which also violates federal antitrust laws.

SUMMARY OF ARGUMENT

The ordinance in question plainly fixes the prices of rents in violation of the Sherman Act. The anticompetitive effects of such action are obvious and pernicious. These effects include: perpetuated housing shortages, increased deterioration of housing stock, increased cost of housing, misallocation of housing stock, and increased concentration in the housing market. The threat of increased concentration is particularly present in this case because of the inevitable delays in the inflation adjustment procedure and the inequitable return on investment standard imposed. These anticompetitive effects should not be weighed against the alleged redeeming virtues of the ordinance. Even if such virtues were weighed, they would not justify the anticompetitive effects.

The anticompetitive impact of the ordinance clearly and significantly affects interstate commerce. The local activity of rental housing is a sufficient basis for Sherman Act jurisdiction. The ordinance itself contemplates a widespread impact. Moreover, as a matter of practical economics, the anticompetitive effects of the ordinance affect interstate commerce.

The ordinance is not exempt from antitrust scrutiny since it neither constitutes the action of the State of California nor implements clearly articulated and affirmatively expressed state policy. Thus, since the ordinance facially conflicts with the Sherman Act and is not exempt from antitrust scrutiny, it is preempted under the operation of the Supremacy Clause.

The opinion below flatly contradicts clear teachings of this Court by authorizing municipalities to violate the Sherman Act through a "public welfare" defense. Moreover, the increasing pervasiveness of rent control laws, already adopted in more than 50 cities in California and over 500 communities in this country, makes these antitrust issues of sufficiently great public importance to resolve.

ARGUMENT

I. THE ORDINANCE IS A MECHANISM FOR PRICE-FIXING AND IS THUS A PER SE VIOLATION OF THE SHERMAN ACT.

A. It Is Unassailable That The Rent Control Activity Called For In This Ordinance Has Significant Anticompetitive Effects.

The rent control activity mandated by the Berkeley ordinance has been condemned by virtually all economists.[1] W. Block, Preface in *Rent Control: Myths & Realities* xiv (The Fraser Institute edit. 1981) (essays by sixteen economists); Rabin, *The Revolution in Residential Landlord-Tenant Law*, 69 Cornell L. Rev. 517, 555 (1984); Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691, 698 (1983). In fact, such near universal condemnation of rent control represents the widest consensus within the economics profession. Block, *supra*. These economists have concluded from ample empirical evidence that rent control schemes cause "serious economic dislocation." *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S.

[1] It is clear why there is such disapproval. Because the government forbids rentals above the old price, a landlord has no incentive to surrender more housing, and tenants are unable to express in money offers to the landlords their new and larger willingness to pay for housing. Thus, the social welfare loss results which represents the sum of consumers' and producers' surplus foregone. D. McCloskey, *The Applied Theory of Price* 214 (1982).

389, 412-413 (1978). For example, Nobel Prize economists Milton Friedman and George Stigler conclude that "Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, retardation of new construction and a future depression in residential building. Formal rationing by public authority would probably make matters worse." M. Friedman & G. Stigler, *Roofs or Ceilings? The Current Housing Problem reprinted in Rent Control: Myths & Realities*, at 102. Thus, it is unsurprising that the President's Commission on Housing called for a ban on municipal rent ceilings. *Presidential Panel Calls for Ban on Rent Control*, 68 A.B.A. J. 903, 904 (1982).

The most harmful economic effect of rent control is its negative impact on the production of housing. For example, the "fair return" approach of the ordinance will actually perpetuate house shortages. "Fair return" destroys the signalling role that profits normally play in an economic system. Where demand for a particular product (like housing) rises, suppliers temporarily receive profits in excess of "fair" or "normal" levels. The existence of these high profits is what induces an increased supply. To the extent high profit rates are not realized, they have the effect of discouraging housing construction and perpetuating housing shortages. R. Ault, *The Presumed Advantages and Real Disadvantages of Rent Control reprinted in Rent Control: Myths & Realities*, at 77. This point has been frequently made in public hearings and discussions. Builders and lenders virtually swore to the Regulations Committee of the President's Commission on Housing that they would never invest in rental housing construction in a community subject to rent controls, even if those controls did not apply to newly constructed housing. Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 721, 723 (1983). Data from rent control areas fully support the notion that rent control discourages housing production. In England, where strict rent controls have been in effect

for over sixty years, the production of private rental housing has been at such a low level that the percentage of households living in this type of housing has dropped from 61 percent to below 15 percent. J. Brenner & H. Franklin, *Rent Control in North America and Four European Countries* 4 (1977). In New York City the number and percentage of persons living in this type of housing also declined. P. Niebanck, *Rent Control and the Rental Housing Market in New York City* 29 (1968). In Washington, D.C., with only brief experience of rent control, the number of units available for rent fell by 8,000 units, *Washington Post*, December 12, 1977, Section A at 1, and the number of multifamily building permits fell from 7,263 in the first four months of 1973 to 220 in the first four months of 1976. Bureau of the Census, U.S. Department of Commerce, *Construction Reports*, Authorized Construction, Washington, D.C. Area, Series C41 (1976).

Maximum rent schemes also may be fixed too low to encourage, or even permit, landlords to furnish services or facilities deemed necessary or desirable by their tenants. *See Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968). This deterioration of housing stock is well supported by research. Empirical results reported by Moorhouse, Sternlieb and RAND show that rent control does lower the level of maintenance of buildings, all other things (including age and condition) being equal. *See* H. Wexler & R. Peck, *Housing and Local Government* 65 (1975).[2] Thus, by promoting the deterioration of rent-controlled buildings and reducing the quality of housing, rent control in another way effectively reduces the quantity of housing services available in the City.

Rent control increases the cost of providing rental housing. Because of the existence of rent control or the threat of its adoption which have the effect of increasing

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[2] In New York City 29 percent of the rent controlled units are deteriorated as opposed to 8 percent of the uncontrolled units. Niebank, *supra* at 120.

the risk associated with investing in rental housing, investors will require the payment of higher interest rates as compensation. R. Ault, *The Presumed Advantages and Real Disadvantages of Rental Control in Rent Control: Myths & Realities, supra* at 71. Since over 40 percent of rent revenues are used to pay debt charges, E. Achtenberg, *The Social Utility of Rent Control in Housing Urban America* (ed. Pynoos, Schafer, and Hartman) 437 (1973), a slight increase in the rate at which these buildings are financed can have a substantial impact on rent levels.

Rent control also is likely to result in a misallocation of the existing housing stock. Ault, *supra* at 70. This occurs when tenants are deterred from moving because the increased difficulty of locating a vacant unit (a result of reduced new construction) and the loss of subsidy associated with tenure. Thus, young, growing families will be inclined to endure crowding rather than relinquish their subsidy, while older tenants remain in larger units as their family size declines with other children leaving home. Niebank, *supra* at 159-160.

The oppressive individual inflation adjustment procedures of this ordinance will increase the concentration in the housing market. As one commentator astutely observed:

> The complexity of appeals may be such that only those landlords who deal with the rent control bureaucracy on a frequent basis are able to comply with the procedures necessary to obtain a rent increase approved [sic]. The nuisance factor alone may be sufficient to cause many small-scale landlords to leave the market.

Ault, at 80 n.34. The ordinance especially threatens small-scale landlords when the harsh nature of procedural delays, inflation, and the return on investment standard are fully understood.

The ordinance unreasonably imposes inherent procedural delays in rent adjustment when it precludes consideration of the effect of inflation in authorizing general adjustments in rent ceilings and requires a petition on an individual basis for this factor to be considered. The court of appeals below correctly concluded that "this results in an inexcusably cumbersome rent adjustment procedure not reasonably related to the ordinance's stated purposes of preventing unwarranted rent increases and therefore deprives landlords of due process of law." 195 Cal.Rptr. 836, 837 (Cal. App. 1 Dist. 1983).

The opinion below asserts that the provisions in the ordinance of no certificate requirement, consolidation, power to appoint hearing examiners, finality of decision, and a time limit of 120 days avoid the delay in the individual adjustment process. 693 P.2d 261 (1984). How these provisions would actually avoid delay is not explained. Moreover, it is plain that these provisions have little effect on delays, much less avoid them. With over 23,000 rental units in Berkeley, the filing of separate petitions by individual landowners would still result in a thousand or more evidentiary hearings. Jurisdictional Statement at 26. In addition to these hearings, this procedural morass requires the Board to: (1) review all information provided by the applicants, including complex financial and tax data; (2) review comments received from tenants. 693 P.2d at 298. The true uselessness of the 120 day time limit is obvious since the ordinance authorizes unlimited extensions "for good cause." Ordinance Section 12(b)(12); J.S. App. at A-128. Thus, most decisions take hundreds of days. Reply at 10 n.8.

Such long delays are confirmed by the experiences of other urban areas. Ault, at 78 n.11. For example, in Washington, D.C., appeals for rent increases generally take six to ten months to resolve, despite the fact that the rent control statute requires that decisions be made within ninety days. *Washington Post*, January 16, 1978, section C at 1.

Not only does the ordinance impose inevitable delays but it requires prohibitive filing fees. The annual filing

fees for such petitions would exceed $1.5 million. J.S. at 26 n.3.

Appellant amply illustrates the serious impact of inflation on the landowners. J.S. at 25 n.22. Assuming an owner's monthly profit on May 31, 1980 was $100, inflation had reduced its value in real terms to $56.80 by the end of 1983. A landowner can only be compensated, if at all, for such a loss via the onerous individual petition process. Using 1979 as a base year, the inflation rate increased 43.2% by December, 1983 in the San Francisco-Oakland area. Using a 1977 base year, which corresponds to the initial rent fixing law, the inflation rate was 70%. *Id.*

It should not be assumed that landowners are in better economic condition to deal with substantial inflation losses than the supposedly protected class of tenants. "In fact, individual tenants frequently have incomes which are *higher* than their landlord's, and to our knowledge, no body of evidence exists which indicates that on average tenants have significantly lower incomes." Ault at 57 (emphasis added).[3]

Many small-scale landowners are further squeezed by the unfairness problems present in the return on investment standard. First, the return on investment standard is unfair to the owner who took by gift, inheritance, or devise, has obtained 100 percent financing, or has converted his investment into debt through refinancing. Since the owner has invested nothing, the return on investment standard dictates he gets no profit for operating his building. Comment, *Rethinking Rent Control*, 12 Rutgers L.J. 617, 645 (1981).

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[3] D. Gale Johnson investigated the issue in detail years ago and concluded, "I do not want to argue that the evidence presented indicates that landlords are poorer than tenants. But the data certainly do not indicate the contrary—that landlords have significantly higher incomes than tenants." Johnson, *Rent Control and the Distribution of Income*, 41 Amer. Econ. Rev., Papers and Proceedings 571 (1951).

The return on investment standard also unfairly penalizes long term owners. Identical units may have been purchased at different prices because they were bought several years apart. Thus, owners who have held their units for a long period of time will be limited to lower rents.

Other difficulties flow from the use of the return on investment standard. Since investment is measured in dollars, rather than by percentage of selling price, the return on investment standard is unfair to the owner who invested when dollars were effectively worth more than they are today. *Id.* The return on investment standard also makes the amount of rent a tenant pays dependent upon the financing terms the owner has been able to negotiate. *Id.*

Unlike the return on investment standard, the return on value standard urged by appellants overcomes its problems. The court below rejected the return on value standard. That rejection was based on the erroneous premise that a return on value standard is circular and unworkable because the determination is based on rents thereby creating a never-ending upward spiral. However, circularity is avoided by use of "historic" value, such as value just prior to the adoption of rent control. Comment, 12 Rutgers L.J. at 641. This approach avoids circularity since future rents would not be used in the valuation. This is consistent with the standard that governs another area of public use—the regulation of public utility rates. The public utility standard provides for a reasonable return on the current value of the property, *Penn Central Transportation Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 1275 (1977), *aff'd*, 438 U.S. 104 (1978), or the value of the property at the time it was devoted to public use. *Southern California Gas Co. v. Public Utilities Commission*, 23 Cal.3d 470, 474, 153 Cal. Rptr. 10, 12, 591 P.2d 34 (1979). Other ap-

proaches such as replacement cost or comparable sales in balanced markets indicate that circularity is not an obstacle to using the return on value standard.

Finally, there are few, if any, "redeeming virtues" in this ordinance to justify its pernicious anticompetitive effects. Section 3 points to alleged public welfare features which supposedly justify rent control: The ordinance is intended "to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of this City with regard to low and fixed income persons, minorities, students, handicapped and the aged." However, such socially redeeming features should not be weighed to offset anticompetitive effects. Justice Lucas, in his dissent to the opinion below, correctly noted that "to allow a local governmental entity to excuse a price-fixing scheme on the basis of asserted public health, safety or welfare considerations would enmesh the courts in an impossible task of weighing the 'apples' of social welfare with the 'oranges' of antitrust policy. 693 P.2d at 317 citing *Boulder*, 455 U.S. at 67 (Rehnquist, J., dissenting). Moreover, such weighing of social factors would, in effect, place "no practical limits whatever on the authority of a municipality to tamper with the price structure established by the openmarket." *Id.* at 317. If municipalities "were free to make economic choices . . . without regard to their anticompetitive effects, a serious chink in the armour of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *City of Lafayette v. Louisiana Power Light Co.*, 435 U.S. 389, 408 (1978).

Even if such social welfare factors were weighed, they would not justify the patent anticompetitive effects because the ordinance imposes unnecessary restrictions on the economic freedom of landowners that are not substantially related to the accomplishment of governmental goals. The ordinance resorts to the extreme measure of rent control as a form of housing policy. It does so without requiring the bona fide housing emergencies that existed in World War I and World War II which first gave rise to rent controls. The condition of "unwarranted rent increases" hardly qualifies as a dire emergency. Even if such a condition were considered an emergency, the permanency of the rent control measures are unnecessary.

The ordinance also erroneously assumes that absent rent control, unwarranted rent increases will occur. That assumption ignores the ability of tenants to protect themselves. Even if tenants were to respond to increases by continuing to demand the same amount of housing, this does not mean they will pay a higher price if they can obtain a similar unit from another landlord at a lower price. Even if all landlords raised their rents, they would soon be faced with competition from the owners of newly constructed units. Ault at 63. Nevertheless, empirical evidence demonstrates that tenants will not demand the same space in response to rent increases.[4]

The ordinance unreasonably and unnecessarily restricts economic freedom because there are alternative means to solving rent increases more consistent with the free market system. As Justice Lucas, in his dissent to the opinion below, accurately noted:

> If the city fathers (and mothers) believe that rents are too high in Berkeley, several solutions come to

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[4] A 1 percent increase in the price of housing will result in a reduction in housing consumption of between 0.7 percent and 1.7 percent. Ault at 63.

> mind which would be more consistent with the operation of the free market system. Rent subsidies may be provided to needy tenants. Public housing projects may afford additional rental units. Property may be municipally acquired through negotiated purchase or condemnation. (cities omitted).

693 P.2d at 318. Ironically, the ordinance will exacerbate, not solve, the social problems cited. For example, rent control measures actually promote racial discrimination. Ault at 61. Absent rent control, landlords who engage in discriminatory practices would be faced with the necessity of accepting either lower rents or higher vacancy rates. Under rent control, these same practices will cost them nothing, and thus they will be more inclined to engage in them. This type of discrimination is likely to occur as well in decisions concerning the eviction of tenants. The experience in New York City confirms these problems. *Id.* at 62.

B. The Anticompetitive Impact Of The Ordinance Clearly And Significantly Affects Interstate Commerce.

It cannot be said that there is an insufficient basis for appellants to establish Sherman Act jurisdiction. Appellants need only allege that the local activity of rental housing has a substantial effect on interstate commerce, not the "more particularized showing" that the rent control measures have substantial effect on interstate commerce. *See Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982). The Sherman Act is an "affecting commerce" statute that reaches substantially as far as the "commerce clause" of the Constitution permits. Indeed, "Congress intended to extend the substantive prohibitions of the Sherman Act to the farthest reaches of its power under the Commerce Clause. . ." Sullivan, *Handbook of Antitrust Law* 709 (1976); *Gough v. Ross-Moor Corp.*, 487 F.2d 373, 375-376 (9th Cir. 1973). In determining the

full extent of commerce clause jurisdiction, this Court ruled that interstate commerce was sufficiently affected in a single extortionate credit transaction which occurred wholly within one city. *Perez v. United States*, 402 U.S. 146, 150 (1971). Since the local activity of rental housing involves many transactions, it clearly exceeds the interstate commercial effect of a single incident of extortion. Moreover, the ordinance itself contemplates a reach beyond a single incident. The ordinance indicates that the local government has undertaken to act as an insurer of adequate housing for its citizens and thus makes rent control part of the inherent enterprise function of the government. This kind of function includes such inherent activities of the government as building and maintaining bridges and roads. In these areas the government has enacted legislation pursuant to an overall plan. Here Berkeley seeks to promote health and safety goals in a widespread fashion that clearly affects interstate commerce.

Appellee seems to argue such governmental measures are purely local and isolated by confusing the arbitral function of government with the enterprise function involved here. In the arbitral function, the government is acting as a mediator between competing economic claims. Such activities contemplate isolated individual cases and are not pursuant to an overall plan. Here the city is obviously not acting as a mediator between individual economic claims. It is pursuing an overall plan that has considerable effect on interstate commerce.

At most, appellants need only allege that Berkeley's price-fixing activities be shown "as a matter of practical economics" to have a "not insubstantial effect on the interstate commerce involved." *McClain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980). It is clear that the anticompetitive effects of the ordinance previously noted have a "not insubstantial effect on interstate commerce."

Appellee contends that it is far from clear that the ordinance imposes any significant effect on interstate financing. Motion at 12. Further, it argues that even if some effect on interstate financing were shown, it is questionable whether it would constitute a significant effect on interstate commerce, when virtually all aspects of rental housing in Berkeley are purely local. *Id.* Such arguments ignore "practical economics." Moreover, it reflects a typically distorted and totally false view of rent control that prompted Nobel Prize economist Friedrich Hayek to declare "The problem of rent control is still frequently judged only in terms of its impact on landlord and tenant, so that other far-reaching repercussions on the whole economic system are largely ignored or underrated." F. Hayek, *The Repercussions of Rent Restrictions, reprinted in Rent Control: Myths & Realities* at 171.

As a "practical matter of economics", "the adverse effects of rent control spread far beyond the boundaries of municipalities." The President's Commission on Housing, *The Report of the President's Commission on Housing* 92 (1982). In fact, it is unreasonable to accept appellee's belief that in an interdependent capitalistic economy the anticompetitive effects of rent control are purely local. The sharp increase in costs, housing shortages, and housing deterioration discourages capital investments and improvements thereby directly affecting financing, construction and material industries, and the interstate flow of goods and materials. Imposition of rent control in a local area inevitably affects the interstate commerce of goods related to rental housing. When competition is reduced, sales of such goods are reduced, resulting in fewer purchases from out-of-state businesses. *See Gough*, 487 F.2d at 378.

Moreover, the ordinance directly affects the interstate movement of people and business. The reduction of mo-

bility problem cited with respect to the effect of misallocation of space also increases unemployment. Ault at 71. Because most labor markets are characterized by rapidly changing job locations, many employees find it necessary to move frequently to keep their present job or to find a new one. Any impediment to this mobility makes it more difficult to match job seekers with available positions. Those who have tenure in a rent controlled unit find it advantageous to forego employment opportunities at a distant location while continuing to search for a position which permits them to remain at their current address. Thus, unemployment rates are higher in rent-controlled areas to the extent workers behave in this fashion thereby reducing the flow of people seeking out-of-state jobs.

C. A Municipality's Participation In A Price-Fixing Scheme Without State Authority Does Not Exempt It From Antitrust Scrutiny.

Berkeley's rent control ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of California itself in its sovereign capacity, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52. Because the ordinance is not the action of the State of California it is unnecessary to apply the sovereign capacity criterion and examine the issue of "active state supervision." *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Even if this criterion were applied, the ordinance would not meet it. The State of California does not in any way supervise local rent control programs. "California has no state rent control statute." 37 Cal.3d at 655; Appendix A at A-6.

Amicus agrees with appellants that Berkeley's ordinance does not satisfy the "clear articulation and affirma-

tive expression" criterion of the state action exemption test set out in *Boulder*. However, appellee argues that the requirement of "clear articulation and affirmative expression" is fulfilled by California statutes requiring each California city to take measures to improve the housing situations of "all economic segments of the community." Motion at 15. It contends that the Legislature has contemplated that the cities themselves will decide what specific measures will best "accommodate local conditions and circumstances." *Id.* Further, appellee contends that *Lafayette* and *Boulder* require only that the Legislature "contemplate the kind of action" taken by the city.

Acceptance of appellee's contentions "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that [this Court's] precedents require." *Boulder*, 455 U.S. at 56. Here the State of California is expressly neutral with regard to rent control. It is not denied "that the California Legislature has not directly spoken on the subject of rent control, much less 'clearly articulated and affirmatively expressed' any policy favoring local ordinances such as Berkeley's." 37 Cal.3d at 714. Plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the state's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. *Boulder*, 455 U.S. at 55. Moreover, where cities may decide what specific measures will best accommodate local conditions and circumstances, the State is clearly allowing them "to do as they please" and can hardly be contemplating the specific anticompetitive actions for which municipal liability is sought. *Id.* The State of California has not specifically authorized California cities to control rents and thus the anticompetitive effects of rent control were not contemplated. *See Town of Hallie v. City of Eau Claire*, —— U.S. ——, 53 U.S.L.W. 4418, 4421 (March 27, 1985).

D. The Ordinance Facially Conflicts With The Sherman Act And Is Thus Preempted Under The Operation Of The Supremacy Clause.

The ordinance unlawfully destroys horizontal price competition among owners of 23,000 rental units. *See Midcal*, 445 U.S. at 103. Moreover, such price control results in other serious anticompetitive effects previously noted. Thus, amicus argues that the ordinance is preempted since it restricts vigorous price competition in contravention of the pro-competition policies and goals of Section 1 of the Sherman Act (15 U.S.C. Section 1).

The Sherman Act reflects long-standing national economic policies that "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). This Court has firmly ruled that any agreement or combination which has the purpose and effect of "raising, depressing, fixing, pegging or stabilizing . . ." prices is illegal per se Under Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Price is the "central nervous system of the economy," *id.* at 226, and an agreement that "interfere(s) with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). Governmentally imposed price levels facially conflict with the Sherman Act because such price-fixing activity "has long been regarded as a per se violation of the Sherman Act." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659-660 (1982).

Significantly, Congress clearly and manifestly affirmed the notion that the federal antitrust laws should supersede the police powers of municipal governments.[5] Thus,

[5] Local Government Antitrust Act of 1984, 15 U.S.C. Section 35; Public Law 98-544.

a preemptive conflict exists in the present case where the ordinance obstructs "the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This Court has resolved such conflicts against state policies not saved by the state action exemption which compel activities that demand private conduct forbidden by the Sherman Act. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). This is especially true when as here a municipal ordinance is involved. In such conflicts with the Sherman Act, the Court has accorded municipalities less deference than states. *City of Lafayette*, 435 U.S. at 412-413. The Berkeley ordinance should be struck down.

CONCLUSION

For all the foregoing reasons, amicus submits that the decision below should be reversed.

Respectfully submitted,

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